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P R O C E E D I N G S

(11:31 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 11-262, Reichle v. Howards.

Mr. Gallagher.

ORAL ARGUMENT OF SEAN R. GALLAGHER

ON BEHALF OF THE PETITIONERS

MR. GALLAGHER: Mr. Chief Justice, and may it please the Court:

The issue before the Court today is whether Secret Service agents who are prepared to take a bullet for the Vice President must also be prepared to take a retaliatory arrest lawsuit, even when they have probable cause to make an arrest. Respondent in this case seeks personal money damages against two U.S. Secret Service agents who arrested him, allegedly with a retaliatory motive, after he lied to them about whether he touched Vice President Cheney.

JUSTICE KENNEDY: There's just a little bit of noise in the courtroom, and I'm -- I have a little bit of difficulty hearing your very opening statement.

MR. GALLAGHER: Sure.

The Respondent in this case seeks personal money damages against three -- against two --

JUSTICE KENNEDY: Yes. Yes.

1 MR. GALLAGHER: -- U.S. Secret Service
2 agents who arrested him, allegedly with a retaliatory
3 motive, after he lied to them about whether he touched
4 Vice President Cheney. There are three reasons why
5 these agents should not be held personally liable.

6 First, the absence of probable cause should
7 be a required element of a retaliatory arrest claim.
8 Thus, this Court is called upon to answer the question
9 that it left open in *Hartman v. Moore*.

10 Second, U.S. Secret Service agents acting in
11 their protective capacity should be entitled to a
12 qualified immunity when they make an arrest with
13 probable cause. Indeed, to view it any other way would
14 be to subject Secret Service agents to the potential of
15 retaliatory arrest claims based upon a mere allegation
16 of retaliatory animus, something this Court has
17 steadfastly refused to do, and for good reason: Because
18 retaliatory animus is easy to allege and hard to
19 disprove.

20 And, third, regardless of whether this Court
21 decides to extend the *Hartman* rule, the law in 2006, at
22 the time of the arrest was not clearly established, thus
23 entitling the agents to qualified immunity.

24 JUSTICE GINSBURG: What was the probable --

25 CHIEF JUSTICE ROBERTS: I don't

1 understand --

2 JUSTICE GINSBURG: What was the probable
3 cause? What was the probable cause for the arrest?

4 MR. GALLAGHER: Justice Ginsburg, the Tenth
5 Circuit found that the probable cause that -- that
6 underlie this opinion was a 10001 -- a 1001 violation,
7 lying to a Federal agent.

8 JUSTICE GINSBURG: Explain that to me.
9 That's a false statement to a government officer, but
10 that's not the reason -- 1001 wasn't the reason that
11 these officers had to arrest. They -- there was a
12 question of assaulting the Vice President, and I think
13 that the charge that eventually was made in the State
14 court was harassment. So, there's no indication that
15 these officers had 1001 anywhere in their minds.

16 MR. GALLAGHER: Well, two points, Justice
17 Ginsburg: First of all, under Devenpeck, officers are
18 not required to give all of the reasons behind an
19 arrest. But, second, and I think perhaps more
20 importantly in this case, when Agent Reichle contacted
21 Mr. Howards and made the arrest, Mr. Howards had lied to
22 him. That was relevant to a Secret Service agent's
23 assessment of the risk of the situation.

24 JUSTICE SCALIA: Do they have to give -- at
25 least when you stop a car, the test is whether there was

1 probable cause, not whether that was the reason that the
2 officer stopped the car.

3 MR. GALLAGHER: That's correct,
4 Justice Scalia.

5 JUSTICE SCALIA: There was a broken
6 taillight. There existed probable cause, whether that
7 was the basis on which he acted or not. Now -- is it
8 any different when --

9 MR. GALLAGHER: I don't think it's any
10 different --

11 JUSTICE SCALIA: With respect to an arrest?

12 MR. GALLAGHER: Yes, with respect to an
13 arrest. This is -- just as long as you establish --

14 JUSTICE SCALIA: So long as they have good
15 reason for an arrest, it doesn't matter.

16 MR. GALLAGHER: Absolutely. That's an
17 objective --

18 JUSTICE BREYER: That -- we've never held
19 that in respect to a claim that the real reason the
20 police arrested was retaliation against, for example, a
21 picket sign having an unpopular point of view or a
22 statement having an unpopular point of view. That is,
23 this Court has never held that it overcomes an arrest
24 where there's a claim of retaliatory First Amendment
25 action; is that right?

1 MR. GALLAGHER: That's right, and --

2 JUSTICE BREYER: All right. And what you're
3 saying is your first reason is that we should say that.
4 And the -- the question I wanted to ask you there is,
5 you make a very strong case where the President and Vice
6 President are involved, the need to protect them, but
7 the rule that you there adopt is a rule that will apply
8 to every police officer, anyone who arrests anyone
9 anywhere in the country, and no matter how clear it is
10 that the motive was retaliation against a point of view,
11 that individual will be protected from a Bivens action.

12 So, it sounds as if your first claim -- the
13 remedy sweeps well beyond the need that you sketch. And
14 so, I'd like your response to that.

15 MR. GALLAGHER: Justice Breyer, I think it
16 has to do with the determination in the Tenth Circuit
17 and the fact that the -- the Tenth Circuit's decision to
18 extend Devenpeck to these facts was not the subject of a
19 cross-appeal. So, the issue that you -- you posit is
20 not an issue that's before the Court. It was --

21 JUSTICE BREYER: I understand that. I'm
22 just saying if I agree with you on your first that if
23 there is a probable cause for an arrest, then wouldn't I
24 have to say there is no retaliatory First Amendment
25 claim when a border officer chases into Arizona a person

1 with whom he politically disagrees, and there are 14
2 bishops who will say he cared about nothing but his
3 political disagreement? And there's nothing to the
4 contrary, and he says: Oh, I happened to notice -- at
5 trial -- that when he left he reached out and snatched a
6 \$5 bill that was in the till. And so, I had probable
7 cause to arrest him.

8 End of case. Now, that sounds very
9 far-reaching, and I don't know that I'm prepared to do
10 that. So, therefore, is there another way you might win
11 your case, or should I do that?

12 MR. GALLAGHER: Well, let me answer both of
13 those questions. What you've outlined is essentially
14 footnote 10 from the Hartman case. That's the footnote
15 that says what do you do if the -- if the person that
16 initiated the prosecution says, I did it for a -- a
17 retaliatory reason? And the Court side-stepped that
18 issue.

19 JUSTICE BREYER: Yes.

20 MR. GALLAGHER: Yes.

21 JUSTICE BREYER: And, of course, Hartman
22 dealt with prosecutions. But people all the time don't
23 arrest others. Policemen frequently don't arrest people
24 for everything they might arrest them for. I mean
25 jaywalking, to take an example. There are all kinds of

1 things where they just normally don't arrest somebody.
2 You might -- or I'm sure you didn't, but I might
3 sometimes have driven 60 miles an hour in a 55-mile
4 zone. And I shouldn't even admit this. I hope I get
5 away with it.

6 (Laughter.)

7 JUSTICE BREYER: But -- but you see, it's
8 different arrests and prosecutions.

9 MR. GALLAGHER: Well, I -- certainly, it's
10 different, but the Devenpeck standard --

11 JUSTICE SCALIA: Is it different? You --
12 you acknowledge that prosecutors always prosecute, that
13 they never exercise discretion and say, oh, what the
14 heck, you know?

15 MR. GALLAGHER: Certainly, Your Honor.

16 JUSTICE SCALIA: All the time. All the
17 time. I don't know that it's any less frequent than --
18 than an officer deciding not to arrest.

19 MR. GALLAGHER: And Justice --
20 Justice Breyer, I think that the difficulty with your
21 hypothetical is, especially with regard to Secret
22 Service agents, who perform -- when they're engaging in
23 their protective functions, they're essentially --

24 JUSTICE SOTOMAYOR: Counsel, that --

25 MR. GALLAGHER: -- in the public's eye.

1 JUSTICE SOTOMAYOR: That's exactly what
2 Justice Breyer is saying. Okay? Which is, as I
3 understand it -- and there's some literature that talks
4 about should we be treating misdemeanor arrests
5 different than felony arrests, because there's less
6 discretion that an officer would have with respect to
7 arresting someone for a felony than for misdemeanors or
8 criminal fines, because like jaywalking, policemen don't
9 arrest you for jaywalking unless they're either on a
10 ticket binge or because there's something about you that
11 they don't like.

12 MR. GALLAGHER: Sure.

13 JUSTICE SOTOMAYOR: So, if that something
14 about you they don't like is that you're wearing an
15 antiwar armband, are we going to let that plaintiff not
16 recover, because somehow we need to protect police
17 officers so much, in the discretionary use of this vast
18 power they have to arrest that we're going to permit
19 them to trample the First Amendment, essentially?

20 Or are we going to say, in the normal
21 situation there is a First Amendment claim, even with
22 probable cause, if you can prove that it's the
23 motivating factor for the arrest; but we treat Secret
24 Service differently?

25 And I think that was the point

1 Justice Breyer's getting to, and the one I'm most
2 interested in.

3 MR. GALLAGHER: Okay.

4 JUSTICE KAGAN: If we don't extend Hartman,
5 how do we in a principled way deal with the unique needs
6 of the Secret Service?

7 MR. GALLAGHER: Let me -- let me briefly
8 address the first half of the question, and then I'll
9 address the second half. The first half, when --
10 Justice Sotomayor, when you suggest that police officers
11 could trample on the First Amendment, it's important to
12 remember we still have probable cause as the -- as the
13 principal picture here.

14 JUSTICE SOTOMAYOR: If you're jaywalking,
15 there's probable cause.

16 MR. GALLAGHER: But probable cause is the
17 Fourth Amendment standard specified by the Framers of
18 the Constitution.

19 JUSTICE SOTOMAYOR: But -- but what does it
20 have to do with violating the First Amendment? Meaning,
21 if police officers have discretion and they would not
22 otherwise arrest you except for their dislike of your
23 speech, that's a violation of your right to free speech,
24 isn't it?

25 MR. GALLAGHER: Well, I'm not sure that that

1 is exactly the case. Again it gets back to this
2 footnote 10 in Hartman, which -- which, there -- Hartman
3 can be read two different ways. It can be read as
4 saying that the elements of the constitutional tort
5 itself require the absence of probable cause, or it can
6 be read as saying the elements of the cause of action.
7 But let me -- let me address the second question.

8 JUSTICE SOTOMAYOR: We can go to that
9 question later.

10 MR. GALLAGHER: Yes. And the second
11 question had to do with Secret Service agents, because
12 Secret Service agents, unlike police officers providing
13 law enforcement functions, when Secret Service are
14 acting in a protective capacity, they are protecting our
15 Nation's leaders and they are doing so in a very public
16 way, and they are also doing so in a way that is
17 essentially a free speech zone.

18 Virtually everyone that a Secret Service
19 agent encounters when he's protecting the President or
20 the Vice President can allege that they're engaged in
21 free speech. So, for Secret Service agents in
22 particular, they -- they can legitimately evaluate what
23 someone is saying in order to determine a particular
24 threat level. And because of that, Secret Service
25 agents have a similar sort of complexity of causation to

1 the -- the situation addressed in the Hartman case.

2 Now, in Hartman, clearly it was a one -- it
3 was a two-individual causation situation, but with
4 regard to Secret Service agents, the causation is
5 similarly complex because Secret Service agents can
6 legitimately take into account what someone is saying in
7 order to determine a threat level.

8 Regardless of whether the Court decides to
9 extend the Hartman case, it's absolutely clear that the
10 law in 2006, in June of 2006 when the agents made this
11 arrest, was not clearly established. The Hartman case
12 was handed down in early 2006. It had only been on the
13 books about 3 months when the arrest was made. For that
14 reason, Secret Service agents should be entitled to a
15 qualified immunity in this case because the law was not
16 clearly established.

17 With regard to the -- the formulation of
18 qualified immunity that we are asking for, we believe
19 that it is important for Secret Service agents acting in
20 this protective capacity to have the requisite breathing
21 room in order to make decisions in life-or-death or
22 imminent-threat situations. In fact, the qualified
23 immunity that we're advocating is particularly important
24 at the margins, particularly important in situations
25 where it's not clear what a Secret Service agent can do

1 or should do, where a Secret Service agent has to make a
2 snap decision in order to determine whether someone's a
3 threat and then act appropriately.

4 The Court in the Atwater case noted that the
5 object of -- of the Court's cases has been to draw
6 standards sufficiently clear and simple to be applied
7 with a fair prospect of surviving judicial
8 second-guessing, months and even years after the -- the
9 arrests are made.

10 JUSTICE GINSBURG: You're not suggesting
11 absolute immunity?

12 MR. GALLAGHER: No, we are suggesting a
13 qualified immunity that's --

14 JUSTICE GINSBURG: But it's a different kind
15 of qualified immunity?

16 MR. GALLAGHER: It's certainly different
17 from the Harlow type of qualified immunity. It is an
18 immunity that is contingent upon having -- contingent
19 upon the Secret Service agent being -- acting in a
20 protective capacity and having probable cause to make
21 the arrest. But, certainly, once the immunity attaches,
22 it would be -- it would be full immunity from a claim.

23 The Court noted earlier this term, in
24 Ryburn v. Huff case, that judges should be cautious
25 about second-guessing a police officer's assessment made

1 on the scene of the danger presented by a particular
2 situation. We think that this case aptly demonstrates a
3 situation in which Secret Service agents made very --
4 very difficult decisions on the spot, and they should
5 not be second-guessed by the Court.

6 Finally, with regard to the -- whether
7 qualified immunity is -- was clearly established in June
8 of 2006, the Ninth Circuit -- the primary case relied
9 upon by the Tenth Circuit was the Skoog case. The Skoog
10 case was the case that the Tenth Circuit relied upon in
11 holding that Hartman should not be extended.

12 It's important, though, when you review the
13 Skoog case to -- to read the entire case, because the
14 Skoog court, after concluding that -- that Hartman
15 should not be extended, still proceeded with the
16 qualified immunity analysis to determine whether the law
17 was clearly established at the time of the incident.
18 And what the Skoog case concluded was -- it looked at --
19 it looked at the nature of the right.

20 And, you know, we know from the
21 Anderson v. Creighton case that this Court has said it's
22 important when focusing on constitutional rights not to
23 look at the 30,000-foot level, not to look at the high
24 level, but to look at the contours of the right. And
25 that's what the Skoog case did.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MR. GALLAGHER: All right. Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Srinivasan.

4 ORAL ARGUMENT OF SRI SRINIVASAN

5 ON BEHALF OF THE UNITED STATES,

6 AS AMICUS CURIAE, SUPPORTING PETITIONERS

7 MR. SRINIVASAN: Thank you,

8 Mr. Chief Justice, and may it please the Court:

9 I'd like to start off addressing the Secret
10 Service in particular because that's the principal
11 focus, although I take the point that there are
12 questions about applying the rule in a broader context.
13 But I think understanding why the rule makes sense in
14 the context of Secret Service agents and law enforcement
15 officers who are performing similar protective functions
16 would help inform why it makes sense to broaden the rule
17 as well. What the Secret Service --

18 I'll pick up on the point that Petitioners'
19 counsel was making, which is that it's legitimate in
20 this context for Secret Service agents to take into
21 account expressive activity in determining whether the
22 circumstances warrant a discretionary exercise of the
23 power to arrest.

24 CHIEF JUSTICE ROBERTS: I assume you would
25 include U.S. marshals?

1 MR. SRINIVASAN: Yes.

2 CHIEF JUSTICE ROBERTS: F.B.I. agents? So,
3 you're talking about protective details.

4 MR. SRINIVASAN: That's correct. And that's
5 why I wouldn't limit it to the Secret Service in
6 particular. I think what happens in a lot of these
7 contexts is that it's natural for these individuals to
8 encounter First Amendment activity by the public, and
9 it's legitimate for them to react to First Amendment
10 activity in deciding whether the circumstances warrant
11 an arrest.

12 And the problem arises because it's very
13 difficult to distinguish between, on one hand, a
14 legitimate consideration of expressive activity as
15 evidencing the sort of threat that warrants a response
16 from an illegitimate consideration of expressive
17 activity borne of a motive to suppress a viewpoint.

18 JUSTICE KENNEDY: Does your rule apply
19 regardless of the degree of animus that the agent is
20 alleged to have had as to the particular view being
21 expressed?

22 MR. SRINIVASAN: I think it would,
23 Justice Kennedy, because we would have an
24 across-the-board, no-probable-cause requirement of the
25 kind that the Court applied in the retaliatory

1 prosecution context in Hartman.

2 Now, I think your -- the question of the
3 degree of animus asserted by the agent on the scene is
4 exactly why these are complicated factual questions.
5 Those kinds of allegations can be made, and then you're
6 going to have a trial where the agent is on the stand,
7 and the jury is going to have a very difficult time, and
8 the agent is going to have a difficult time explaining
9 why it is that he acted legitimately based on expressive
10 activity because he felt that there was a threat to the
11 person he was trying to protect, as opposed to
12 explaining that he didn't act in order to suppress the
13 viewpoint that was being asserted.

14 These kinds of allegations can often be
15 made. And, in fact, they can even be manufactured at
16 the scene by an intelligent person who's going to be the
17 subject of an arrest. And I think that complicated
18 question of causation is exactly why it makes sense to
19 apply in this context the same objective screening in
20 the form of a no-probable-cause requirement in Hartman
21 to this context of retaliatory arrest.

22 JUSTICE SCALIA: Why is there any difference
23 if -- when ordinary policemen are policing an authorized
24 demonstration --

25 MR. SRINIVASAN: Yes.

1 JUSTICE SCALIA: -- in front of this Court
2 or anywhere for that matter? The people making the
3 demonstration have -- have the same motivation and can
4 make the same assertion of, oh, the only reason you
5 arrested me was because you didn't like what I was --
6 what I was talking about. So, why should that situation
7 be different?

8 MR. SRINIVASAN: That's correct,
9 Justice Scalia, and that was going to be my next point.
10 Once we understand why it is that it makes sense to
11 apply this rule in the context of officers who engage in
12 this sort of critical public protective functions of the
13 Secret Service, I think we understand why it also makes
14 sense to apply it in other situations, because law
15 enforcement can legitimately take into account
16 expressive activity when they're engaged in functions
17 such as crowd control.

18 And in those contexts as well, it's going to
19 be difficult to disaggregate the legitimate
20 consideration of expressive activity as evidencing a
21 threat --

22 JUSTICE BREYER: Illegitimate? You just --

23 MR. SRINIVASAN: -- from an illegitimate
24 desire to suppress a viewpoint. Sorry.

25 JUSTICE BREYER: Look, you just used the

1 word "crowd control." And I take it, in saying the word
2 "crowd control," you are making a distinction.

3 MR. SRINIVASAN: I'm making a --

4 JUSTICE BREYER: Do you want -- do you want
5 the same rule of automatic, you know, immunity -- it's
6 sort of automatic immunity -- when crowd control isn't
7 at issue, where there's a history of persecution of an
8 individual by a particular officer, da, da, da? I mean,
9 you know, we can make up cases.

10 MR. SRINIVASAN: I think --

11 JUSTICE BREYER: Did you want it absolutely
12 across the board, or are you going to start making
13 distinctions?

14 MR. SRINIVASAN: I -- I would not draw a
15 distinction, Justice Breyer. Of course, there's going
16 to be factual situations --

17 JUSTICE BREYER: I mean, I agree with you
18 about the crowd control.

19 MR. SRINIVASAN: Yes.

20 JUSTICE BREYER: I see that. I see that
21 problem. I see the problem of protecting people in
22 public life; I see the problem in protecting the
23 President.

24 MR. SRINIVASAN: Well, I think --

25 JUSTICE BREYER: Now, how far -- now, given

1 that that's a particular problem where views are likely
2 to be evidentiary -- unpopular views actually are,
3 unfortunately, but how far do you extend it? You say
4 extend it to everything. To jaywalking, to
5 persecutions, to, you know -- that's what's making me a
6 little nervous.

7 MR. SRINIVASAN: Right, and I can understand
8 the basis for the nervousness. I guess the question for
9 the Court is whether the benefits of having an
10 administrable across-the-board rule outweigh the costs
11 of trying to forge some sort exceptions to deal with
12 extreme hypotheticals. And --

13 JUSTICE SOTOMAYOR: Do you have a sense of
14 how many of these First Amendment retaliatory claims in
15 those jurisdictions that permit them -- I know they're
16 more limited -- how many of these cases arise?

17 MR. SRINIVASAN: We do. We've done --

18 JUSTICE SOTOMAYOR: And with what frequency?

19 MR. SRINIVASAN: We've done an unscientific
20 search, but to use the same time frame of reference that
21 the Court used in Hartman, which is looking back
22 25 years, if you do a sort of standard Westlaw search,
23 what you'll see is there's roughly a hundred court of
24 appeals cases and 450 or so district court cases
25 where --

1 JUSTICE SOTOMAYOR: And how many arrests are
2 there a year?

3 MR. SRINIVASAN: I don't know.

4 JUSTICE SOTOMAYOR: It's -- a non-felony.
5 I'm sure it's in the millions.

6 MR. SRINIVASAN: It's -- the -- I'm sure
7 there are scores and scores of arrests. That's correct.
8 And, of course, all we're talking about is the cases
9 that get to the point where you have an opinion that can
10 be -- that can be found. And there's the obvious point
11 that, depending on what the Court does here, you may see
12 a proliferation of -- of those claims. And we certainly
13 hope that wouldn't be the case.

14 But I think on -- in -- on the question of
15 whether it makes sense to have an across-the-board rule,
16 I guess I would echo what Petitioners' counsel was
17 suggesting, which is you can have the same set of
18 considerations in the retaliatory prosecution context
19 because prosecutors do act with -- by hypothesis, with
20 illicit motives in some situations.

21 And the Court considered whether the
22 benefits of having an across-the-board rule outweigh the
23 costs of forging an exception to deal with extreme
24 circumstances. And what the Court said was: We want to
25 have a rule that's designed to deal with the mine run of

1 cases; we don't want to have a rule that has an
2 exceptional-circumstances exception because in that --
3 at that point, there will be a great deal of litigation
4 concerning what cases fit within of the exception and
5 what cases don't.

6 And what the Court said was that's rather
7 like designing a retirement plan to deal with the
8 possibility that someone might win the lottery. That's
9 in footnote 10 of Hartman. And I think similar
10 considerations would weigh -- counsel in favor of
11 applying an across-the-board objective,
12 no-probable-cause screen in this context as well. And I
13 think it's important to understand that --

14 JUSTICE GINSBURG: Even though this -- I
15 think in Hartman, Justice Souter gave two specific
16 reasons, neither of which apply in this context. I
17 mean, this is -- it's the prosecutor who institutes the
18 charges, but the suit is not against the prosecutor, who
19 would be absolutely immune. So, that is not in this
20 picture. Here we have one officer.

21 So, it would certainly be an extension of
22 Hartman because the reason that Hartman gave for the
23 rule was tied to -- very much tied to prosecution rather
24 than arrest.

25 MR. SRINIVASAN: Well, I -- with respect,

1 Justice Ginsburg, I think this case is of a piece with
2 Hartman in two relevant respects. Your Honor is quite
3 correct that Justice Souter's opinion focused on the
4 fact that you have two individuals in play. You can
5 have that situation here, but we don't base it on that.

6 What the opinion was getting to was that
7 that creates complex issues of causation in the
8 prosecution context. And I think it was the complex
9 causation that really drove the need to have an
10 objective across-the-board rule.

11 You have the same kind of complex causation
12 problem here, for the reasons that I've explained, which
13 is that it's extremely difficult to disentangle a
14 legitimate desire to act -- to suppress danger, of which
15 speech is evidence, from an illegitimate desire to
16 suppress a viewpoint.

17 JUSTICE KENNEDY: You might apply the same
18 immunity for selective enforcement based on race?

19 MR. SRINIVASAN: The same immunity?

20 JUSTICE KENNEDY: Yes.

21 MR. SRINIVASAN: No. The -- they -- I think
22 the Court's decision in Whren, for example, supposes
23 that even though you have probable cause, you can have
24 an equal protection claim if the proof could be made --
25 and this is very important. In the equal protection

1 context, including for race, there is a different
2 objective screen in place, and it's a stringent
3 objective screen that this Court announced in Armstrong,
4 which is that --

5 JUSTICE KENNEDY: Well, I'm aware of the
6 reservation in Whren. Why should there be a difference
7 in the Fourteenth Amendment equal protection and First
8 Amendment speech?

9 MR. SRINIVASAN: Well, I think part -- part
10 of the reason is this, that in -- with the First
11 Amendment, expressive activity can legitimately be taken
12 into account precisely because it can manifest a danger,
13 whereas with race in the ordinary case, I think the
14 reason why we have these principles in the race context
15 is it's ordinarily not a relevant consideration.

16 And the Armstrong rule is designed to
17 distinguish between circumstances in -- in which race
18 was the motivation and in which race wasn't the
19 motivation. And it serves that purpose well. But it
20 doesn't work so well in this context, because here First
21 Amendment activity can legitimately be taken into
22 account; when, as in this case, a Secret Service agent
23 overhears an individual say that he's going to ask the
24 Vice President how many babies he's killed, it makes all
25 the sense in the world for the Secret Service to focus

1 their attention on that person.

2 JUSTICE SCALIA: What -- what about for
3 crowd control? You want to extend it to crowd control
4 as well. What difference does the First Amendment make
5 there?

6 MR. SRINIVASAN: Well, I think it's -- the
7 nature, intensity, and vehemence with which the First
8 Amendment activity is being engaged in can inform an
9 officer on whether the circumstances present the kind of
10 danger that warrants a law enforcement response.

11 So, I -- and when a law enforcement officer
12 does that, he's going to be subject to potential
13 liability if an individual says: Look, you weren't
14 reacting against me because of the way I was expressing
15 my views; you were acting -- reacting against me because
16 you disagreed with my views and you wanted to suppress
17 them.

18 And that's a very hard thing to disentangle.
19 And it not only has that problem at the back end, but it
20 results in a problem at the front end as well, because
21 what happens at the front end is that officers at the
22 very outer margins might have in the back of their mind
23 a concern that if they acted based on their best
24 intuitions about what kind of law enforcement response
25 is warranted, they might later be subject to suit based

1 on a mistaken assumption and potentially an ability to
2 convince a jury that they were acting based on an
3 illegitimate desire to suppress a viewpoint rather than
4 on a legitimate desire --

5 JUSTICE BREYER: How many cases -- you might
6 know this; you might have information on how many cases
7 over 5 years or whatever period there actually have been
8 against Federal protective officials of retaliatory
9 First Amendment activity.

10 MR. SRINIVASAN: I -- I don't know --

11 JUSTICE BREYER: It would be in the
12 Department, wouldn't it? They'd keep track?

13 MR. SRINIVASAN: It's potentially there, but
14 I just -- I don't have the answer at my disposal,
15 Justice Breyer.

16 JUSTICE BREYER: Do we know that this is not
17 unique, the one before us?

18 MR. SRINIVASAN: Well, these -- certainly,
19 we know that these kinds of interactions arise with some
20 frequency. I think there was some publicity surrounding
21 the --

22 JUSTICE BREYER: But when you looked up your
23 research for this, did you find any other case in which
24 anyone had ever asserted a First Amendment claim of
25 retaliation for an arrest?

1 MR. SRINIVASAN: In --

2 JUSTICE BREYER: Yes, against a Federal --

3 MR. SRINIVASAN: In this --

4 JUSTICE BREYER: Against a Federal
5 protective official.

6 MR. SRINIVASAN: No, I -- candidly, I didn't
7 -- we didn't conduct a search with that object in mind.
8 So, I can't give you an answer one way -- one way or the
9 other.

10 I did want to make one additional point,
11 Justice Ginsburg, in response to the question you posed
12 about the applicability of Hartman, which is that at one
13 level it applies, the rule should apply, because the
14 same concern with complex causation is at issue here at
15 well -- as well.

16 But the other way to think about the
17 applicability of Hartman is to -- is to put these cases
18 on a spectrum. On one end, you have what the Court in
19 Hartman identified as a standard retaliation case, of
20 which the Court identified public employment as the
21 archetypal example. And on the other end, you have
22 retaliatory prosecution, where the Court thought that
23 there were sufficient concerns about complicated
24 causation that it made sense to have an across-the-board
25 objective rule.

1 Now, the question could be where does
2 retaliatory arrest fit within that spectrum? Is it on
3 the retaliatory prosecution side or is it on the public
4 employment side? And for a couple of reasons, I think
5 it fits decidedly within the retaliatory prosecution
6 side.

7 One is the one I've given, which is that
8 speech can legitimately be taken into account. And so,
9 it creates complex causation. But the other one is in
10 some sense the flip side of that, which is that in the
11 -- in public employment context, the standard fact
12 pattern is going to involve a long-term relationship
13 between an employer and an employee, during which time
14 there's been no adverse action; the employee then
15 engages in some sort of expressive activity, in the
16 aftermath of which the employer undertakes some adverse
17 action such as a termination.

18 Now, in that context it makes sense to infer
19 that there may well be an illegitimate speech --
20 speech-suppressive motivation at work, because you have
21 in some sense a control period in the interactions
22 between the employer and the employee that pre-dated the
23 expressive activity.

24 That's not the case when we're dealing with
25 law enforcement. In the law enforcement context in the

1 main, this is a one-time interaction between an officer
2 and a suspect, the arrestee. You don't have the prior
3 relationship that acts as a control. And so, you have
4 to ask the question whether, based on that one-time
5 relationship, is there a basis for inferring that a
6 speech-suppressive motivation was at work?

7 And here, because it can be legitimate for
8 an officer to take into account speech in deciding
9 whether this situation is the kind of one in which a law
10 enforcement response is warranted, it makes sense,
11 unlike in the public employment context, to apply the
12 same objective across-the-board screen in the form of a
13 no-probable-cause requirement that you have in
14 prosecutions.

15 JUSTICE GINSBURG: May I go back to the
16 probable cause, the question I asked before? It's not
17 like the taillight. 1001 came up in court. I -- this
18 situation may well have warranted probable cause for
19 assault, probable cause for harassment. But where did
20 -- but the 1001 was not the -- was in no one's mind. It
21 does seem quite strange.

22 MR. SRINIVASAN: It was not, Your Honor. Of
23 course, that's exactly what happens in the Fourth
24 Amendment context. That's -- that was the issue before
25 the Court in Devenpeck, and the Court explained in

1 Devenpeck why it makes sense to have an objective
2 probable cause inquiry rather than a subjective one.

3 JUSTICE GINSBURG: But doesn't it matter
4 that it's something that comes up only in court; it's
5 not something that -- I mean, why wasn't the natural --
6 well, one would expect probable cause to arrest because
7 it was an assault or harassment -- the actual charges
8 that were made?

9 MR. SRINIVASAN: I don't know the reason
10 that a -- I don't know the precise contours of the
11 harassment charges in State court that were made. I
12 think that they mapped on in some measure to the
13 assault, the assault that was suspected by the -- by
14 Officer Reichle, who effected the arrest.

15 Now, I think the concern with importing some
16 sort of subjective probable cause dimension into the
17 inquiry -- if you asked, you know, what offense did the
18 officer in fact have in mind, it's the same concerns
19 that drove the Court to apply an objective rule in
20 Devenpeck, including, for example, that you would have
21 dis-uniformity, in that similarly situated individuals
22 would be treated differently based purely on what
23 happens to have been in an officer's mind.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Lane.

2 ORAL ARGUMENT OF DAVID A. LANE

3 ON BEHALF OF THE RESPONDENT

4 MR. LANE: Thank you, Mr. Chief Justice, and
5 may it please the Court:

6 I think what we have here is a solution
7 being offered by the Government, and now we have to go
8 find the problem. And I think that's what
9 Justice Breyer's question was directed at here.

10 I have done, not a scientific search, but I
11 can take credit for a little bit of science involved in
12 determining how many such cases arise. And at page 13
13 of our brief, we cite in footnote 8 that a search with
14 no time limitations whatsoever going back in LEXIS with
15 the words "Bivens" or "1983," "retaliatory arrest," not
16 limited to protective details, shows 15 reported Federal
17 appellate cases, with no time limitations whatsoever.

18 So, we have a solution, but we really don't
19 have a problem. The only Secret Service case that this
20 Court has ever heard that I'm aware of involving
21 anything remotely like this is Hunter v. Bryant. So,
22 this is not a significant problem.

23 This also factually is probably not the best
24 case for them to be making their argument that we need
25 some sort of special rules that apply to the Secret

1 Service, given the facts of this case, where Mr. Howards
2 by all accounts walked over to the Vice President,
3 looked at him and said: "I just want you to know I
4 think your policies in Iraq are disgusting."

5 There is a dispute at that point whether he
6 gently patted him on the arm -- not a crime -- or tapped
7 him on the shoulder -- again, not a crime -- or --

8 JUSTICE BREYER: There's no --

9 JUSTICE SCALIA: That's an assault, isn't
10 it?

11 MR. LANE: I'm sorry.

12 JUSTICE SCALIA: All it takes for an assault
13 is an unwanted touching.

14 MR. LANE: Well, incidental contact is not
15 an assault, and everyone on the Mall --

16 JUSTICE SCALIA: It's not incidental if you
17 reach out and touch somebody on the shoulder or the arm.

18 MR. LANE: Well, the problem is that the
19 Vice President was on the Mall having contact with
20 numerous people, shaking their hands, letting them pat
21 him on the back, telling him what a great job he's
22 doing.

23 JUSTICE SCALIA: That's fine, and he didn't
24 -- he doubtless didn't consider those contacts hostile.
25 But when somebody tells you "I think your policies are

1 disgusting" --

2 MR. LANE: And then --

3 JUSTICE SCALIA: I mean, just don't tell me
4 that it's -- it's not a crime. It is an assault if it's
5 an unwanted touching.

6 MR. LANE: Well, under Colorado law, he was
7 charged with harassment, and --

8 CHIEF JUSTICE ROBERTS: Well, what you've
9 described is not when the person was arrested, right?

10 MR. LANE: That's correct.

11 CHIEF JUSTICE ROBERTS: The person was
12 arrested later, when approached by the Secret Service
13 agent, lied about whether he touched the Vice President;
14 at that time, in a non-protected area, was carrying a
15 bag, right?

16 MR. LANE: Correct.

17 CHIEF JUSTICE ROBERTS: And wandering
18 around. Turns out that he was looking for his son. But
19 if you're the Secret Service agent, you see somebody who
20 said your policies are disgusting, that person touches
21 the Vice President, he comes -- he lies to you. He
22 comes back, he's carrying a bag and he's wondering --
23 wandering around, do you think it's reasonable at
24 that -- well, I guess you don't --

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: To arrest the
2 person?

3 MR. LANE: That's a multifaceted question.
4 I'll try my best to cut right to it.

5 CHIEF JUSTICE ROBERTS: The reason it's
6 multifaceted is because I'm trying to capture what might
7 have been going through the Secret Service agent's mind
8 at the time.

9 MR. LANE: Well, that's -- that is part of
10 the point I have to make here, all right? In this
11 Court's jurisprudence on Fourth Amendment issues, what
12 is going on in the agent's mind is irrelevant. The
13 issue is --

14 CHIEF JUSTICE ROBERTS: Well, what would be
15 going in a reasonable Secret Service's agent's mind at
16 the time.

17 MR. LANE: Right. First level of inquiry,
18 was there a Fourth Amendment violation? No, according
19 to the Tenth Circuit. We then have got to shift gears
20 if we're going to do a First Amendment analysis. And is
21 this a retaliatory arrest or not?

22 We have got to look into the subjective mind
23 of the agent. That's where Justice Ginsburg's questions
24 I think take on great import for this discussion,
25 because, as she correctly pointed out, the agents on

1 scene never said in deposition, they have never claimed
2 anywhere, that they arrested Mr. Howards on a 1001
3 violation.

4 The agents on scene in deposition said we
5 arrested him because of the way he approached the Vice
6 President -- not a crime -- and his demeanor. We
7 thought it might be an assault. That later morphed into
8 a State charge of harassment. Nobody ever said 1001
9 formed any basis whatsoever.

10 JUSTICE BREYER: Yes, but they did say --
11 and also you've left out that one of the agents
12 overheard him say he was going to ask the Vice President
13 how many babies he killed that day.

14 MR. LANE: Right.

15 JUSTICE BREYER: Okay. So, their job is to
16 protect the Vice President.

17 MR. LANE: Absolutely.

18 JUSTICE BREYER: That's their job.

19 MR. LANE: Correct.

20 JUSTICE BREYER: And it's a very emotional
21 subject.

22 MR. LANE: Absolutely.

23 JUSTICE BREYER: And if something happens to
24 the President, nobody's going to say, oh, you know, what
25 were you doing? And the whole country is in mourning.

1 MR. LANE: Correct.

2 JUSTICE BREYER: We understand that. And,
3 therefore, it's a matter of concern that the -- if you
4 have a rule of law that says to the agents, when you
5 hear someone who says how many babies are you going to
6 kill that day, I'm going to ask the Vice President, I'm
7 going to touch him, I am going to then tell them a lie
8 when they ask me if I touched him -- that's cause for
9 concern.

10 MR. LANE: Absolutely.

11 JUSTICE BREYER: Okay. Now, if there's a
12 lawsuit, the agency will say we just can't do it. We
13 can't do it. We can't use that as a basis for stopping
14 that individual.

15 MR. LANE: Well, that --

16 JUSTICE BREYER: All that poses a problem.
17 Now, you're -- and I -- I think -- I recognize that it's
18 a problem. I'm not saying I have the solution.

19 MR. LANE: Well, I think you hit on the
20 solution as part of the problem you just expressed, and
21 that is, can they stop this individual? And the answer
22 is "absolutely yes." They have every arrow in their
23 quiver, under Terry v. Ohio. They can stop him if they
24 perceive a threat. They can force him to open up his
25 opaque bag. They can force him to show them what's in

1 the box inside the opaque bag. They can pat him down.
2 They can wand him with a metal-detecting wand. They can
3 assure themselves --

4 JUSTICE SCALIA: And it wouldn't be a
5 violation of the First Amendment if they only did that
6 because they didn't like the ideas he was expressing?

7 MR. LANE: They are allowed --

8 JUSTICE SCALIA: Wouldn't that be a
9 violation of the First Amendment?

10 MR. LANE: They are allowed to take
11 reasonable steps under Terry, under every conceivable
12 case that this Court's ever decided.

13 JUSTICE SCALIA: Even though they're doing
14 it for -- they do it for a racial reason, would that be
15 okay?

16 MR. LANE: No. No. What I'm saying --

17 JUSTICE SCALIA: Of course not. I don't see
18 how your -- your First Amendment exception doesn't apply
19 to those things as well as to --

20 MR. LANE: It would.

21 JUSTICE SCALIA: -- to the arrest.

22 MR. LANE: It would. If he could prove that
23 they did a Terry stop on him in retaliation for his free
24 speech and it was motivated -- and I know this -- Your
25 Honor's feelings about intent -- intent-motivated

1 constitutional torts.

2 But if he could prove that the Terry stop
3 was motivated by -- in an effort to punish him for his
4 free speech, yes, that would be a cause of action as
5 well.

6 CHIEF JUSTICE ROBERTS: So, what you have,
7 under your theory, a person should put on his car a
8 bumper sticker that says "I hate the police" and that
9 every time they're pulled over, they will have --
10 certainly a plausible case is you violated my First
11 Amendment rights. It's not because I was going 60 miles
12 an hour; it's because of my bumper sticker.

13 MR. LANE: Well --

14 CHIEF JUSTICE ROBERTS: And the police
15 officer -- at that point, he says, you know, I can't
16 give a ticket to this guy without being hauled into
17 court on personal liability because he's got a credible
18 case that was for First Amendment grounds.

19 MR. LANE: Well, I think we can look at
20 the -- as I've said, the arrows in the quiver of the
21 Court to weed out those kinds of cases.

22 CHIEF JUSTICE ROBERTS: No, no. You've
23 already got the officer in court. I mean, you get a
24 speeding ticket, and most times they don't show up
25 because they have got other things to do. Now he's got

1 to show up in district court, in State court, to defend
2 against this.

3 MR. LANE: Well, I mean, litigious
4 plaintiffs are a consistent problem across the board
5 under many contexts. And there's really -- you know,
6 there's almost nothing that can be done. This Court has
7 taken steps to cut back prison litigation that's
8 frivolous, things of that nature.

9 But, yes, if -- the heightened pleading
10 standard this Court enunciated in *Iqbal*: You can't just
11 come up with conclusory allegations.

12 CHIEF JUSTICE ROBERTS: Right. Well,
13 this --

14 MR. LANE: You have to have facts in support
15 that that's why they stopped me, because of my bumper
16 sticker.

17 CHIEF JUSTICE ROBERTS: Is that -- is that a
18 case that you could state?

19 MR. LANE: That would be --

20 CHIEF JUSTICE ROBERTS: He pulled me over,
21 he gave me a speeding ticket, but the only reason he
22 picked me out is because I had a bumper sticker saying
23 "I hate the police."

24 MR. LANE: Well --

25 CHIEF JUSTICE ROBERTS: Does that go to

1 trial?

2 MR. LANE: No, that doesn't necessarily go
3 to trial. That's a conclusion, first of all --

4 CHIEF JUSTICE ROBERTS: Why doesn't it go to
5 trial? And -- well, does it go -- I mean, do you get
6 to depose the police officer? You know, why did you stop
7 him? Did you stop anybody else for going 65 miles an
8 hour that day?

9 MR. LANE: Well, I mean, these evidentiary
10 questions have to be first of all supported in a
11 pleading with heightened scrutiny under Iqbal.
12 Conclusions are not simply enough. But you have --

13 JUSTICE SCALIA: It's not a conclusion. I
14 mean, if -- if he didn't have the bumper sticker and you
15 asserted in the pleading he stopped me because he knows
16 I hate the police, that's a conclusion. But if you have
17 the bumper sticker, he says, you know, I had the bumper
18 sticker, and that's why he stopped me.

19 MR. LANE: Well, let me give the flip side
20 of that and say if the police officer did stop him
21 because of the bumper sticker, he should go to trial.
22 He should be held accountable for that.

23 CHIEF JUSTICE ROBERTS: So, the only way you
24 could find out is you put in the evidence -- here's the
25 bumper sticker -- and you put the police officer on the

1 stand --

2 MR. LANE: Well --

3 CHIEF JUSTICE ROBERTS: -- and you say, why
4 did you do it?

5 MR. LANE: Under --

6 CHIEF JUSTICE ROBERTS: And then all of a
7 sudden -- I don't know why everybody doesn't have a
8 bumper sticker.

9 MR. LANE: Theoretically, every single
10 person who has ever been arrested for any crime could
11 raise a first amendment retaliation lawsuit. Every
12 convicted murderer doing time throughout this country
13 could do that. They don't, however. There is -- there
14 is not a rush to the courthouse of retaliatory arrest
15 claims because the pleading requirements are heightened.
16 Qualified immunity for over a hundred years has
17 protected the Secret Service. They've been protecting
18 the executive branch --

19 JUSTICE BREYER: Well, say, though, that in
20 the case of the President, what you're hearing is, as
21 you well know, that the combination of disparate
22 political views and risk is unlike other situations.
23 And I don't know if they can prove it or you could prove
24 the contrary, but that's -- that's a claim. And I can't
25 say there's nothing to it.

1 So, let me suggest to you another arrow
2 which -- ask you what you think of this arrow, and the
3 answer's going to be not much, but I'm interested in
4 hearing --

5 MR. LANE: Go ahead.

6 JUSTICE BREYER: -- your reason.

7 MR. LANE: I'm ready.

8 JUSTICE BREYER: In -- in Hartman, Justice
9 Ginsburg and I dissent.

10 MR. LANE: Yes.

11 JUSTICE BREYER: And we referred to a D.C.
12 Circuit case. And in the D.C. Circuit, it said -- it
13 talked about rare cases "where strong motive evidence
14 combines with weak probable cause to support a finding
15 that the prosecution would not have occurred but for
16 the ... animus." Now, so far, you think "fine."

17 But suppose you were to say because of the
18 factors that have just been mentioned where the
19 President's at stake, the courts -- where his life is at
20 stake, the President's -- the courts will not infer once
21 probable cause exists that it's weak. And the courts
22 will not infer from the simple presence of political
23 disagreement that the motive of retaliation is strong,
24 which in fact would produce a very limited extension of
25 Hartman to the case of protecting the President of the

1 United States.

2 And now, I know you're not going to agree
3 with that, and I'm trying it out and I'm not saying I
4 agree with it, but I want to see what you -- how you
5 react.

6 MR. LANE: Well, let's take a look at the
7 facts of this case. The Tenth Circuit found there was
8 probable cause for a 1001 violation. But was there
9 probable cause -- is there a great body of
10 circumstantial evidence surrounding this case that would
11 point to probable cause which should be considered in
12 deciding how this case proceeds? We have the agent in
13 charge of the protective detail, Agent Lee, standing 8
14 inches away from Vice President Cheney when this entire
15 encounter occurs. Agent Lee testified he saw no crime
16 committed. We had numerous agents --

17 JUSTICE SOTOMAYOR: Excuse me.

18 MR. LANE: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: Let's go past that for a
20 second. What was it that the arresting agent said or
21 did that showed the animus? Meaning, because that
22 another officer actually saw it and understood himself
23 what he thought doesn't mean that this agent who was
24 told that there had been a touching had that
25 information.

1 MR. LANE: The evidence --

2 JUSTICE SOTOMAYOR: So, I know collective
3 knowledge is a theory in a lot of cases, but let's deal
4 with the facts of this case. What's the animus?

5 MR. LANE: Well, there were discrete First
6 Amendment episodes that occurred in the context of this
7 case. One was testified to by Mr. Howards in his
8 deposition, that when he first of all was approached by
9 Agent Reichle, Agent Reichle said, "I want to talk to
10 you," and flashed his badge, and Mr. Howards declined
11 the invitation to talk to Agent Reichle. That,
12 according to Mr. Howards, angered Agent Reichle. That
13 is a First Amendment significant event in and of itself.

14 Steve Howards testified that he then was
15 asked by Agent Reichle: We want to talk to you about
16 assaulting the Vice President. And his response was: I
17 didn't assault the Vice President; I merely criticized
18 his policies in Iraq, and if you don't want him
19 criticized publicly he should stay in his undisclosed
20 location. Or words to that effect.

21 Again, Mr. Howards testified that angered
22 Agent Reichle. At that point, the cuffs went on. And I
23 think that is circumstantial evidence in support of the
24 animus for what -- what was going on. Agent Reichle was
25 on notice as to what Howards had said to the Vice

1 President --

2 JUSTICE SOTOMAYOR: How does all of that
3 prove your point of animus in light of the undisputed
4 fact that he lied about touching the Vice President?

5 MR. LANE: Well, again --

6 JUSTICE SOTOMAYOR: And that's the --

7 MR. LANE: -- lying to the Vice President is
8 what we look at on a Fourth Amendment analysis, because
9 what's in Reichle's actual mind under Devenpeck is
10 irrelevant. So, yes, there was probable cause, but was
11 Reichle himself directing his animus at Mr. Howards and
12 arrested him? We have to look into what was actually in
13 his mind, and that was not in his mind. A 1001
14 violation was not in his mind. We looked -- what was in
15 his mind? And we've already said what was in his mind
16 is he approached the Vice President, he criticized him
17 publicly --

18 JUSTICE SOTOMAYOR: You do understand that
19 this case is inviting the questions the Chief Justice
20 asked, which -- and which -- as Justice Breyer and some
21 of us are concerned about, which is what your adversary
22 has described as First Amendment voicing is going to be
23 a part of many, many arrests.

24 MR. LANE: Absolutely.

25 JUSTICE SOTOMAYOR: How do we draw a line

1 outside of the one that you proposed by your
2 adversaries, that probable cause is the line?

3 MR. LANE: Well, that line --

4 JUSTICE SOTOMAYOR: That doesn't enmesh the
5 police in a constant barrage of claims that just because
6 they angered a police officer, that's why they were
7 arrested.

8 MR. LANE: Well, first of all, there has not
9 been this constant barrage. Hartman has only applied
10 until -- I mean, this Court decided Hartman in 2006 for
11 retaliatory prosecutions. There has not been a run on
12 the courthouse on retaliatory arrests --

13 JUSTICE ALITO: Would you --

14 MR. LANE: -- either before Hartman or
15 after.

16 JUSTICE ALITO: Would you acknowledge that
17 the Secret Service faces a different situation from
18 ordinary police officers in conducting their daily
19 activities, in that Secret Service agents may
20 legitimately take into account First Amendment activity
21 by someone who is in the vicinity of the President or
22 the Vice President in assessing the degree of danger the
23 person presents?

24 MR. LANE: This may not help my case, but
25 I'll go further than that and I'll say any police

1 officer has an absolute right to listen to what any
2 protester is saying and consider what is being said in
3 terms of assessing the level of threat that that
4 protester poses.

5 But as I said in this case, they had every
6 right to stop Mr. Howards, to do a Terry stop on him,
7 because they were concerned about him. And reasonable
8 cause for concern under Terry is the standard. You
9 don't need probable cause to pat someone down under
10 Terry. It's simply if a reasonable officer would be
11 concerned.

12 JUSTICE SCALIA: Again, I don't understand
13 why you -- why you say that they're immune from the
14 charge of First Amendment retaliation for that but not
15 immune from the charge of First Amendment -- I mean --

16 MR. LANE: I'm not --

17 JUSTICE SCALIA: If you say they're doing it
18 on First Amendment grounds for the one, they're doing it
19 on the First Amendment grounds for the other. Why is
20 either one okay?

21 MR. LANE: I'm not saying that they're
22 immune on a Terry pat down if it's done in retaliation
23 for free speech. I'm simply saying that would make it a
24 much more difficult case for any protester to go to a --
25 to go to court and say the only reason he patted me down

1 is in retaliation for my free speech.

2 JUSTICE BREYER: Okay. So, then putting it
3 in their point of view, I just what he actually said.
4 He was very angry, your client. I mean, judging what he
5 said -- there were a lot of swear words and so forth --
6 he was pretty angry at this whole situation.

7 So, you're a Secret Service agent, and you
8 hear him say -- speak like this -- he has every right to
9 speak like that. I mean people do. I understand that.
10 But now he's also thinking that -- I'm nervous about
11 this. The President is here, the Vice President,
12 whatever --

13 MR. LANE: Sure.

14 JUSTICE BREYER: -- same thing -- and I've
15 got to do my job. So -- and nobody's going to say, ho,
16 ho, First -- whatever if is -- if somebody is hurt.

17 MR. LANE: I agree with that.

18 JUSTICE BREYER: Now, he has also lied about
19 whether he touched the President.

20 MR. LANE: So --

21 JUSTICE BREYER: And he has also been
22 talking about the President killing people.

23 MR. LANE: First order of business --

24 JUSTICE BREYER: Killing babies and so forth
25 and --

1 MR. LANE: Let's see if he's a threat.

2 JUSTICE BREYER: All right. So, what is he
3 supposed to do in that situation?

4 MR. LANE: He's supposed to -- if he -- if
5 he has reasonable cause to believe Steve Howards is a
6 threat --

7 JUSTICE BREYER: Well, he is in this
8 situation --

9 MR. LANE: Okay.

10 JUSTICE BREYER: But this situation, I've --
11 I'm pretty --

12 MR. LANE: Right. Then he pats him down.
13 He opens the bag --

14 JUSTICE BREYER: Nothing there.

15 MR. LANE: Nothing there.

16 JUSTICE BREYER: He says, okay --

17 MR. LANE: Then they monitor him, and they
18 watch him, and -- and that's all.

19 JUSTICE BREYER: There's a lot of people in
20 that place.

21 MR. LANE: There is no probable cause to
22 believe he has committed a crime at that point.

23 JUSTICE BREYER: Well, he lied. He --

24 MR. LANE: But they didn't know that. That
25 was not in their minds. That's -- we're doing a First

1 Amendment analysis and not the Fourth Amendment analysis
2 at this point. First Amendment analysis --

3 CHIEF JUSTICE ROBERTS: But they didn't
4 arrest him -- they didn't arrest until after he lied,
5 right?

6 MR. LANE: But it was never in their minds.
7 They testified. That didn't have anything to do -- that
8 is the Tenth Circuit's post hoc rationale under
9 Devenbeck, which -- Devenpeck -- which says you -- if
10 there's any objective probable cause that the Tenth
11 Circuit or this Court or any other court can concoct,
12 post hoc, even though it wasn't in the officer's mind,
13 that's good enough to arrest somebody. That's -- that
14 probable cause. All right?

15 But in First Amendment analysis, it can't be
16 an objective standard. There -- objective standards are
17 clean, they are nice, they -- they create bright lines.
18 But when we are looking at a First Amendment violation,
19 we have to got to be able to get into subjective intent
20 of the officer at -- on the scene.

21 JUSTICE ALITO: And when you say that, that
22 means that almost all of these cases have to go to
23 trial --

24 MR. LANE: No, they don't.

25 JUSTICE ALITO: -- in front of a jury.

1 Well, how are -- how can they be stopped before they go
2 to trial?

3 MR. LANE: Because if -- first of all, as
4 I've said, Iqbal requires heightened pleading, not just
5 conclusions. We have the summary judgment standard.

6 JUSTICE ALITO: I engaged in First Amendment
7 -- I engaged in First Amendment activity.

8 MR. LANE: We have a summary judgment
9 standard, where -- and, in fact, in Butz, this Court
10 held that a firm application of rules of civil procedure
11 will always prevent frivolous claims and meritless
12 litigation from occurring in situations exactly like
13 this. And that's true. A firm application of the rules
14 of civil procedure, a summary judgment standard, which
15 is --

16 CHIEF JUSTICE ROBERTS: Well, summary
17 judgment, that's -- you've already been in court for a
18 long time when you're talking about summary judgment.

19 MR. LANE: There's no easy way out of this,
20 unfortunately. Frequently, when you're talking about --

21 CHIEF JUSTICE ROBERTS: Well, there is an
22 easy way out of it. We could agree with the --

23 (Laughter.)

24 MR. LANE: Well, that, unfortunately, is an
25 easy way out of the First Amendment as well. I mean,

1 this Court has decided some incredibly difficulty cases.
2 Snyder v. Phelps, authored by Your Honor, very difficult
3 case. Could it be side-stepped, by -- you know,
4 somebody steps off a curb and is thereby jaywalking?
5 Are we limiting --

6 CHIEF JUSTICE ROBERTS: One thing about your
7 analysis that concerns me is that you seem to have a
8 very black-and-white view of what's going on in the
9 officer's mind: Did you stop -- did you arrest him
10 because of retaliation or was it because of legitimate
11 security?

12 And I suspect that the people engaged in
13 this type of thing have intuition. I mean, they don't
14 sit there and say, well, let's see; is it because he
15 says he didn't like the war in Iraq, or is because he's
16 wandering around, looks like he's looking for something,
17 with a -- with a bag? I mean, I assume they sort have
18 experience and they calculate all this in and say I've
19 got to do something. And how do you parse those
20 different motivations?

21 MR. LANE: Well, what I say about that
22 is that -- and, again, I know this is not an answer that
23 you're probably going to like, because this means a
24 trial is involved, but this is what juries do on a daily
25 basis throughout this country, in every criminal case.

1 What is the subjective intent of the defendant? In
2 every civil case, is this an intentional act, a knowing
3 act, a reckless act, a negligent act? That's what
4 juries do.

5 And if there's enough evidence to get this
6 case to trial -- and I would posit it that in this case,
7 where you have agent after agent after agent who saw the
8 encounter up close and personal with the Vice President
9 and Mr. Howards, none of whom saw any evidence of any
10 criminal activity by Mr. Howards, all of whom let Mr.
11 Howards walk away from the scene, that's good evidence
12 that --

13 CHIEF JUSTICE ROBERTS: One reason that I,
14 in fact, don't like the answer is because what the agent
15 is now going to have to factor -- in addition to the
16 hostility of the views, the touching of the Vice
17 President, the lying about it, the wandering around with
18 the bag -- is in the back of his mind, you know, if I'm
19 wrong, I may be held personally liable in damages for
20 taking some action that some jury somewhere is going to
21 say was based on retaliation rather than my obligation
22 to protect the Vice President.

23 MR. LANE: Well, I mean, theoretically yes,
24 that could be a problem. And I am quite certain that
25 certain civil litigants -- just as in criminal cases,

1 people are wrongly accused of things that they didn't
2 do, they end up in a trial, and sometimes juries get the
3 wrong results and an injustice occurs.

4 We can't fix all those problems when it's
5 not really a significant problem. There are no run on
6 the courtrooms around the land of these kinds of cases
7 arising. We don't need to have any rules that
8 specifically pertain to the Secret Service when, to my
9 knowledge, this Court has had one Secret Service case in
10 its entire history, and there are 15 appellate reported
11 Federal decisions regarding retaliatory arrests,
12 period --

13 JUSTICE ALITO: Which -- is there a record
14 of retaliatory arrests by Secret Service agents against
15 people who say things that are critical of the President
16 and the Vice President?

17 MR. LANE: The only way I know to look for
18 that is on Westlaw or LEXIS. And Mr. Srinivasan
19 indicated that they found 100 or 400 cases. We did a
20 search like that. We came up with the same number. We
21 dug down into those cases. And in terms of actual
22 litigated retaliatory arrest cases, we found 15 total.
23 That's not scientific, but that's the best I've got for
24 you at this point.

25 And I don't know if there's a repository of

1 where we can find that or not. But this -- and I
2 started this argument by saying this is a solution in
3 search of a problem. The Secret Service has adequately
4 done their jobs beautifully over -- for over a century.
5 And there is no reason to put some different rule down
6 on the Secret Service.

7 JUSTICE SCALIA: Well, we lost a couple of
8 Presidents, didn't we?

9 (Laughter.)

10 MR. LANE: Well, they're doing the best they
11 can. I mean, that's -- I understand that. But it is --
12 it is a serious, serious issue to curtail the First
13 Amendment.

14 Consider the situation where you actually
15 do -- and I believe this is that case -- you have Secret
16 Service agents who deserve to be taken to a trial
17 because they have gone out of their way to punish
18 someone for their free speech.

19 What do you do about those guys?

20 JUSTICE GINSBURG: But it's ambivalent. I
21 mean, suppose it turns out you have this trial. We know
22 what words were spoken. Get to the trial; it turns out
23 Reichle is a strong opponent of the war in Vietnam.
24 Then, end of trial, right?

25 MR. LANE: You know, that would be a fact to

1 be considered by the jury. I could lose this trial when
2 we go back, if we get a trial. That's what -- that's
3 what jury trials are all about, Justice Ginsburg.

4 And I'm not saying that I have to show
5 evidence to this Court that I'm going to win the trial
6 before I win this case. The issue simply is, can we
7 sacrifice the First Amendment? You know, does a
8 litterbug lose their right to have First Amendment free
9 speech, does a jaywalker lose their right to have First
10 Amendment free speech because probable cause exists to
11 believe they've committed some offense? And you'll have
12 officers ostensibly enforcing litter laws and jaywalking
13 laws and blocking-the-sidewalk laws, and First Amendment
14 is essentially evaded.

15 A hundred years of jurisprudence, courageous
16 jurisprudence, many times by this Court, goes by the
17 boards because somebody is a litterbug. I just don't
18 see that as the solution to this problem, and I also
19 don't see that the Secret Service needs some enhanced
20 protection from this Court when this has never been and
21 is not now any kind of a serious problem.

22 The status quo is Mount Healthy. It has
23 worked for decades, and it should continue to work. And
24 if these agents get tagged in this case, maybe they
25 deserved to get tagged in this case, because the First

1 Amendment is extremely important. And I don't denigrate
2 the job of law enforcement or these agents in any way.

3 I'm simply saying that when the First
4 Amendment is at stake, I think -- and the law has been
5 working just fine throughout decades, to extend the no
6 probable cause in Hartman to on-street encounters where
7 there is no complex causation chain, where the main
8 actor in Hartman was immune completely from lawsuit --
9 the prosecutor in Hartman could not be sued under any
10 circumstances, nor could the prosecutor in Hartman be
11 questioned in deposition under our traditions. We don't
12 question prosecutors in depositions about why they made
13 decisions to go ahead and prosecute. So, this Court
14 stepped back in Hartman and said that's a different
15 story.

16 But on-street encounters -- if you extend
17 the no-probable-cause requirement to on-street
18 encounters, any rogue police officer, or Secret Service
19 agent, who wants to can ostensibly enforce any number of
20 legal violations -- 1 mile an hour over the speed limit,
21 you're going to jail allegedly for going 1 mile an hour
22 over the speed limit; or under Atwater, for not wearing
23 a seat belt -- when the real reason is your bumper
24 sticker.

25 If you can prove that, they should go to

1 trial.

2 Absent any further questions, I'll sit down.

3 Thank you very much.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 12:30 p.m., the case in the

7 above-entitled matter was submitted.)

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